

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LOUIS RODRIGUEZ,

Defendant and Appellant.

E030401

(Super.Ct.No. FMB03711)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bert L. Swift,
Judge. Affirmed in part, reversed in part.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and
Lilia E. Garcia, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

In 2001 an amended information charged defendant and appellant Jose Louis
Rodriguez (defendant) with four counts of lewd and lascivious conduct upon a child

under the age of 14 in violation of Penal Code¹ section 288, subdivision (a). It was further alleged that the lewd acts in counts 1 through 4 involved substantial sexual conduct on a victim under the age of 14, and were committed on more than one victim at the same time and in the same course of conduct within the meaning of sections 1203.066, subdivisions (a)(7) and (a)(8), and 667.61, subdivision (b).

A jury found defendant guilty of all four counts as charged and found true the special allegations. The trial court sentenced defendant to state prison for a total indeterminate term of 60 years to life.

In January 2003 we issued an opinion affirming the conviction. However, on July 5, 2004, we granted defendant's motion to recall the remittitur based on appellate counsel's failure to raise a sentencing error. Thereafter, we vacated the 2003 opinion. We ordered the case to be rebriefed.

After rebriefing, the case is again before us for decision. This time, defendant raises a single contention – that the trial court erred in concluding that it did not have the discretion to impose concurrent 15-year-to-life terms on counts 2, 3, and 4 under the one strike provisions of section 667.61. The People concede this issue. Therefore, we shall remand this case for resentencing to allow the trial court to exercise its discretion and determine whether consecutive or concurrent sentences should be imposed for counts 2, 3, and 4.

¹ All statutory references are to the Penal Code unless otherwise specified.

FACTUAL AND PROCEDURAL HISTORY

Because this appeal deals solely with the sentencing of defendant, we need not go into the details of the case. In short, defendant, who was 36 years old at the time of trial, was found guilty of four counts of molesting his daughters, I. R. and C. R., ages 8 and 10, respectively, in violation of section 288, subdivision (a). The acts occurred between May 1998 and December 1999, and consisted of penile and digital penetration, and oral copulation.

At the sentencing hearing, defense counsel argued that although the trial court was mandated to impose a sentence of 15 years to life on each of the four convictions, the trial court had the discretion to order concurrent sentences. The prosecution, however, argued that (1) at least two of the sentences had to be consecutive, one for each named victim; and (2) the court could impose concurrent sentences only if the offenses were committed on the same occasion – the prosecution took the position that the offenses were committed on separate occasions.

The trial court adopted the prosecution's interpretation of the law and made the finding that it had no discretion in the matter. The court, therefore, found that it had to impose consecutive sentences on all four counts – 15 years to life for each conviction for a total sentence of 60 years to life. The court stated: “[S]o I will make the finding that, to reserve it for appeal, the court feels it does not have the ability to exercise its discretion in sentencing under these circumstances concurrently as to terms 2, 3, and 4”

When defense counsel sought clarification, the trial court repeated that it had no discretion but to impose consecutive sentences on all four counts. Thereafter, the trial court imposed consecutive sentences on all four counts.

ANALYSIS

I. The Trial Court Erred When It Stated That It Had No Discretion to Consider

Concurrent Sentences Under Section 667.61

Defendant contends that the trial court erred when it stated that it had no discretion to impose concurrent 15-year-to-life terms under section 667.61 for counts 2, 3, and 4 (violation of section 288, subdivision (a)). “Reluctantly, [the People] agree[.]”

Section 288, subdivision (a) has long provided that nonforcible lewd act offenses shall be punished by terms of three, six, or eight years. (*People v. Hammer* (2003) 30 Cal.4th 756, 765.) In 1994, however, the Legislature enacted section 667.61 – otherwise known as the one strike law. Section 667.61 provides for indeterminate terms of either 15 years to life or 25 years to life for section 288, subdivision (a) and certain other sex offense *if* certain circumstances apply, regardless of whether the defendant has prior convictions. (Stats. 1993-1994, 1st Ex. Sess., ch. 14, § 1, p. 8570; *People v. Wutzke* (2002) 28 Cal.4th 923, 929-930.)

Section 667.61, as relevant to this case, states:

“(b) Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in

subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

“(c) This section shall apply to any of the following offenses: [¶] . . . [¶] (7) A violation of subdivision (a) of Section 288 [¶] . . . [¶]

“(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim. [¶] . . . [¶]

“(g) The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.”

As the People point out, although the statutory language of section 667.61, subdivision (b), mandates the imposition of 15 years to life for *each* count involving separate occasions and separate victims, section 667.61 does *not* mandate that those terms must be served consecutively. (See § 667.61, subd. (g); *People v. Murphy* (1998) 65 Cal.App.4th 35, 39, 43.) Absent an express statutory provision to the contrary, section 669 provides that a trial court shall impose either concurrent or consecutive terms for multiple convictions. Section 669 provides:

“When a person is convicted of two or more crimes . . . , the second . . . judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another [¶] Upon the failure of the court to determine how the terms of imprisonment on the second . . . judgment shall run, the term of imprisonment on the second . . . judgment shall run concurrently.”

In exercising its discretion whether to impose concurrent or consecutive terms, a trial court should consider the factors set forth in California Rules of Court, rule 4.425, which provides:

“Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

“(a) Facts relating to the crimes, including whether or not:

“(1) The crimes and their objectives were predominantly independent of each other.

“(2) The crimes involved separate acts of violence or threats of violence.

“(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

“(b) Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact

used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences."

In this case, the trial court mistakenly believed that it had no discretion to impose concurrent sentences under the one strike law. Therefore, the case should be remanded to allow the trial court to exercise its discretion in determining whether the sentence on counts 2, 3, and 4 should be served concurrently or consecutively to the sentence on count 1.

DISPOSITION

The judgment of conviction is affirmed but the judgment is reversed as to defendant's sentence. The sentence is vacated and the case remanded for resentencing.

CERTIFIED FOR PUBLICATION

/s/ Ward
J.

We concur:

/s/ Ramirez
P. J.

/s/ Richli
J.